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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. ____ 78-1503

SOCIALIST WORKERS PARTY, et al.,

Plaintiffs and Petitioners,

vs.

MARCH FONG EU, Secretary of State of California,

Defendant and Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TOPICAL INDEX

		Page
Table of Authorities		iii
OPINION BELOW		2
JURISDICTION		2
STATUTES INVOLVED		3
QUESTIONS PRESENTED		4
STATEMENT OF THE CASE		4
REASONS FOR GRANTING THE WRIT		8
I	THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, ERRED IN DECIDING THIS CASE ON THE RATIONAL BASIS TEST RATHER THAN THE STRICT SCRUTINY TEST.	8
II	DENIAL OF ACESS FO THE NON-STATEWIDE BALLOT BY NON-QUALIFIED PARTIES IS CONSTITUTIONALLY IMPERMISSIBLE.	10
III	POLITICAL PARTIES' RIGHT TO BALLOT ACCESS IS DISTINCT FROM CANDIDATES' RIGHTS TO BALLOT ACESS, AND EACH CAN BE ABRIDGED ONLY BY A COMPELLING STATE INTEREST.	12

CONCLUSION 14

APPENDIX A
District Court Order and Judgment, dated September 9, 1976

APPENDIX B
Court of Appeals Opinion, dated September 26, 1978

APPENDIX C
Court of Appeals Order, dated January 25, 1979

APPENDIX D
California Elections Code §6430

APPENDIX E
California Elections Code §§6800, et seq.

APPENDIX F
California Elections Code §10210

TABLE OF AUTHORITIES

Cases — Page

Illinois State Board of Elections v. Socialist Workers Party, ___ U.S. ___ (1979); 47 L.W. 4197 — 9, 10, 13, 14

Libertarian Party of California v. Olson, Orange County Superior Court Case Number 29-73-84 — 7

Socialist Workers Party, et al. v. March Fong Eu, 433 U.S. 901 (1977) — 3

Storer v. Brown, 415 U.S. 724 (1974) — 5, 10, 12, 13

Williams v. Rhodes, 393 U.S. 23 (1968) — 10

Constitution

United States Constitution, First and Fourteenth Amendments — 2, 10

Federal Statutes

28 U.S.C.:

Section 1254(1) — 3

Section 1331(a) — 2

28 U.S.C.:

Section 1343(4) 2

Section 1357 2

Section 2201 2

Section 2202 2

Section 2281 2

Section 2284 2

42 U.S.C.:

Section 1981 2

Section 1985(3) 2

Section 1988 2

State Statutes

California Elections Code:

Section 6430 4

Section 6430(b) and (c) 5

Sections 6800, et seq. 4

Section 10210 3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Socialist Workers Party, et al., respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on September 26, 1978, Petition for Rehearing denied January 26, 1979.

OPINION BELOW

The opinion of the court of appeals has been reported at ___ F.2d ___. It is reprinted at pages B-1 to B-25 of the Appendix. This opinion reversed the opinion of September 9, 1976, of a District Court of three judges for the Northern District of California, which was unreported, and which is also reprinted in the Appendix, at pages A-1 to A-14.

JURISDICTION

In July, 1973, petitioners filed suit in the United States District Court for the Northern District of California alleging deprivation of their constitutional rights by the operation of provisions of the California Elections Code governing access to the ballot for new parties.

Jurisdiction was alleged under the First and Fourteenth Amendments, and under 28 U.S.C. 1331 (a), 1343(4), 1357, 2201, 2202, 2281, and 2284, and 42 U.S.C. 1981, 1985(3), and 1988.

Because petitioners sought an injunction against the operation of California law, application was made for the convening of a three-judge District Court under 28 U.S.C. 2281, and a three-judge court was duly convened.

The court filed its opinion on September 9, 1976, partially in favor of petitioners and partly in favor of respondent. Notice of appeal to this

court was filed by petitioners on November 23, 1976, in the District Court. This court summarily affirmed the District Court decision on June 27, 1977. Social Workers Party, et al. v. March Fong Eu, 433 U.S. 901 (1977).

In the meantime, respondent California Secretary of State March Fong Eu appealed that portion of judgment of September 9, 1976, that was unfavorable to her to the U.S. Court of Appeals, Ninth Circuit. The Ninth Circuit reversed the trial Court and petitioners filed a Petition for Rehearing. On January 26, 1979, judgment denying the Petition for Rehearing was entered by the clerk of the appeals court. Jurisdiction is conferred on this Court by 28 U.S.C. 1254(1).

STATUTES INVOLVED

Petitioners challenge the constitutionality of California Elections Code Section 10210, as it relates to non-statewide office.[1/] Section 10210 states that candidates for partisan office, nominated by petition for the general election ballot, must be listed on the ballot as "independent," and may have no other political designation printed. This statute is reprinted at page F-1 of the Appendix.

1/ All references are to Sections of the California Elections Code unless otherwise indicated.

Also relevant to consideration is Section 6430, reprinted at page D-1 of the Appendix, which governs political party qualification for the ballot, and Sections 6800, et seq., which describe the "independent nominations" method for placing candidates as an alternative to the process described in Section 6430. These sections are reported at pages E-1 to E-8 of the Appendix.

QUESTIONS PRESENTED

The questions presented for review are as follows:

A. Whether California law governing qualification of political parties for ballot status is unconstitutional in view of the fact that no provisions is made for a party, not qualified for the entire state, to qualify in a portion of the state.

B. Whether the strict scrutiny test, or the rational basis test, should be used to adjudicate question A above.

STATEMENT OF THE CASE

Petitioners are several political parties and various of their candidates for district office in the 1974, 1976, and 1978 general elections. When this lawsuit was first filed in United States District Court in 1973, petitioners faced a situation in which both of the alternate means for ballot access (the

new party procedures and the independent candidate procedures) were so difficult as to be virtually unusable.

However, in 1976 the California legislature eased the independent candidate procedure. Previously the independent procedure had required a petition signed by a number of voters equal to 5% of the last vote cast, to be collected in 25 days, and only registered voters who had not voted in the preceding primary were eligible to sign. The present independent candidate's procedure allows any registered voter to sign the petition and allows 61 days in which to collect the signatures; the number of signatures is 1% of the total number of registered voters for statewide office, and 3% of the total number of registered voters for district office. The California legislature made these changes in the independent candidate's procedure as a result of this Court's ruling in Storer v. Brown, 415 U.S. 724 (1974). Although that ruling merely remanded the case to the lower court, and did not hold the old California independent procedure unconstitutional, it did cast serious doubt on its constitutionality.

Although the California legislature eased the requirements for independent candidates in 1976, it did not then, nor has it since, changed the requirements to qualify a new party. The only procedures recognized by respondent California Secretary of State to qualify a new party for the ballot are contained in Section 6430(b) and (c): either to submit a petition bearing signatures equal to 10% of the last gubernatorial vote (currently 713,289 signatures); or to obtain party membership, as reflected on the voter's affidavit of registration, equal to 1% of the last gubernatorial vote) currently 71,329 members). Both procedures

must be completed in the last week of December, or the first week in January preceding the November general election. The 10% petition procedure has existed in the law since 1937, and has only been used in 1948. The 1% registration procedure has existed since 1929 and has only been used in 1938 and in 1968.

Beginning in 1976, petitioners, as well as other parties unable to qualify under Section 6430, have used the independent nomination method to qualify their candidates. In 1976, all seven candidates who qualified under the independent nomiation method for any partisan office were actually candidates of unqualified parties; in 1978, four of the five candidates who qualified by independent nominations procedure were actually party candidates.

The three Judge District Court decision of September 9, 1976, dealt with petitioners' complaint that the party qualification law provided no means for a party which could not qualify statewide, to qualify in part of the state. The District Court applied the strict scrutiny test to this issue and held that there was no compelling state interest for forcing a party to quality statewide, or not at all. The District Court granted petitioners' declaratory relief only, and did not grant an injunction to permit petitioner candidates for district office, who had qualified for the ballot under the independent procedure, to use their party label in place of the word "independent."

Respondent Secretary of State of California appealed the granting of declaratory relief to the

United States Court of Appeals, Ninth Circuit. No decision from the federal court of appeals had been received by mid-September 1978, shortly before the 1978 ballots were to be printed. Thereupon, petitioner Libertarian Party sought an order in California State Court to have "Libertarian" printed on the ballot in place of "independent" for two of its candidates who had qualified for state legislative races. The order was granted. Libertarian Party of California v. Olson, Orange County Superior Court, Case No. 29-73-84. The two candidates polled 5.8% and 4.4% of the total vote in their respective districts.

On September 26, 1978, after the ballots had been printed, the U.S. Court of Appeals reversed the District Court's judgment that California is constitutionally obliged to provide procedures for a party to qualify in just part of the state.

Petitioners thereafter filed with the United States Court of Appeals, Ninth Circuit, a Petition for Rehearing. The Petition for Rehearing was denied and judgment was entered on January 26, 1979.

The United States Court of Appeals, Ninth Circuit, used the rational basis test rather than the compelling interest or strict scrutiny test in reaching their ruling, contrary to this Court's pronouncements, and for this reason petitioners seek this Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I

THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, ERRED IN DECIDING THIS CASE ON THE RATIONAL BASIS TEST RATHER THAN THE STRICT SCRUTINY TEST.

The Ninth Circuit held that, once the candidates of petitioner political parties were able to have their names printed on the ballot, their fundamental rights had been fulfilled. The court ruled that such candidates had no fundamental right to have the name of their party printed adjacent to their names, in place of the word "independent." It stated,

> "The Supreme Court seldom has to consider the degree of burden on fundamental rights caused by state voting regulation. In most cases, the burden was substantial because the restriction led to absolute exclusion of certain voter options through denial of ballot access, e.g., American Party of Texas, supra, p. 13; Bullock, supra, 13, Williams, supra, 13, Storer, supra, p. 13, or by denial of the franchise itself, e.g., Dunn v. Blumstein, supra, p. 13; Kramer v. Union School District, 395 U.S. 621 (1969); Carrington v. Rash,

> 380 U.S. 89 (1965). As the court has recognized, however, 'not ever limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." Bullock, 405 U.S. at 143.

In reaching this decision, the Court of Appeals considered the rights of petitioner political parties, as opposed to the rights of their candidates. If a party name cannot be printed on the ballot in a partisan election in which already-established parties can have their names on the ballot, then that party has been denied ballot status.

Previous opinions of this Court, as well as the February 22, 1979, decision of this Court in Illinois State Board of Elections v. Socialist Workers Party, make it clear that laws which deny access to political parties can only be justified by a compelling state interest.

> "The freedom to associate as a political party, a right we have recognized as fundamental, see id., (Williams v. Rhodes), at 30-31, has diminished practical value if the party can be kept off the ballot." Illinois Board of Elections v. Socialist Workers Party, 47 L.W. 4197, 4200 (1979), ___ U.S. ___.

When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest.

Illinois Board of Elections v. Socialist Workers Party,
47 L.W. 4197, 4200 (1979), ___ U.S. ___.

In Williams v. Rhodes, the opportunity for political activity within either of two major political parties was seemingly available to all. But this Court held that to comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot. (Emphasis added.)

Storer v. Brown,
415 U.S. 724, 732 (1974).

II

DENIAL OF ACCESS TO THE NON-STATEWIDE BALLOT BY NON-QUALIFIED PARTIES IS CONSTITUTIONALLY IMPERMISSIBLE.

California, unlike the large majority of states, lacks any procedure by which a party's candidate can appear on the ballot in a non-statewide election, unless that party qualifies statewide.

The current requirements to qualify a party statewide are either 713,289 signatures, or 71,329 members registered to vote with the particular party.

Some legislative districts in California currently have within them fewer than 71,329 registered voters. Thus, a non-qualified party which wished to gain ballot access in such a legislative district could register every voter in the district as a member and still not qualify. Thus, California's denial of ballot access to non-statewide parties in certain districts is an absolute bar, violative of equal protection and the parties' right to association.

For example, between 1971 and 1974, La Raza Unida Party (which has never been qualified for the statewide ballot in California) held between 4% and 5% of the voter registration in the legislative district comprising the greater part of East Los Angeles. In November 1974, a leader of La Raza Unida Party, campaigning for the non-partisan post of councilman of East Los Angeles as a La Raza Unida Party candidate, won the election, leading all other candidates. Clearly La Raza Unida enjoyed substantial voter support in that portion of the state. Yet, under the California system, La Raza Unida Party was not permitted to be on the ballot in that (or any other) legislative district, since it had not qualified state-wide.

III

POLITICAL PARTIES' RIGHT TO BALLOT ACCESS IS DISTINCT FROM CANDIDATES' RIGHTS TO BALLOT ACCESS, AND EACH CAN BE ABRIDGED ONLY BY A COMPELLING STATE INTEREST.

In Storer v. Brown, 415 U.S. 724 (1974), this Court made it clear that a state is constitutionally required to provide ballot access for both political parties and independent candidates.

> "It may be that the 1% registration requirement is a valid condition to extending ballot position to a new political party. But the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." Storer v. Brown, 415 U.S. 724, 732 (1974).

This court went on to state further in Storer v. Brown,

> "In Williams v. Rhodes, 393 U.S. 23 (1968), the Court held that although the citizens of a State are free to associate with one of the two major political parties, to participate in the nomination of their chosen party's candidates for public office and then to cast their ballots in the general election, the State must also provide feasible means for other

> political parties and other candidates to appear on the general election ballot" (emphasis added). Storer v. Brown, 415 U.S. 724, 721 (1974).

The Court in Williams v. Rhodes, 393 U.S. 23 (1968), required Ohio not only to put Governor George Wallace on the ballot as a candidate for president, but to put him on the ballot with "American Independent" next to his name.

It is clear from this Court's decisions that a political party has a constitutional right to appear on the ballot. This right is in addition to, and distinct from, the right of its candidates to appear on the ballot. The right of a political party to a place on the ballot is as substantial a right as that of the candidate to be on the ballot. This right can be curtailed only by a compelling state interest.

This court has stated in Illinois State Board of Elections v. Socialist Workers Party, decided February 22, 1979,

> "Restrictions on access to ballot burden two distinct and fundamental rights, 'the right of individuals to associate for the advancement of political beliefs, regardless of their political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast votes effectively.' Williams v. Rhodes, supra, at 30. The freedom to associate as a political party, a right we have recognized as fundamental, see id., at

30-31, has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because, absent recourse to referendums, 'voters can assert their preference only through candidates or parties or both.' Lubin v. Panish, 415 U.S. 709, 716 (1974). By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences. And for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure. Wesberry v. Sanders, 376 U.S. 1, 17 (1964); Reynolds v. Sims, 377 U.S. 533, 555 (1964); Dunn v. Blumstein, supra, at 336." Illinois State Board of Elections v. Socialist Workers Party, ___ U.S. ___, 47 L.W. 4197, 4200 (1979).

CONCLUSION

California provides no means for a party to qualify in just part of the state, if it cannot or does not qualify statewide. This condition, coupled with the extraordinarily difficult procedure to qualify a party statewide denies petitioner political parties' First Amendment associational rights and substantially affects voting rights. This scheme is not necessary to further any comeplling state interest. The Court of Appeals

erroneously applied the rational basis test to adjudicate the issue, and did not examine possible state interests in requiring a party to qualify statewide, or not at all. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C-73-1165 ACW
(Three-Judge Court)

SOCIALIST WORKERS PARTY, *et al.*,

Plaintiffs,

v.

MARCH FONG EU, Secretary of State
of the State of California,

Defendant.

ORDER PARTIALLY GRANTING PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT AND PARTIALLY DISMISSING AMENDED COMPLAINT

This is the second part of a lawsuit by five political parties and a number of potential candidates asserting the unconstitutionality of the California statutes governing access to the ballot by political parties. By a previous order filed June 7, 1976, this Court rejected plaintiffs' challenge to the statutes, California Elections Code §§6430(c) and (d), governing access by political parties to the statewide primary and general election ballots. In its order, the Court gave plaintiffs leave to file an amended complaint to properly raise the issue of the state's prohibition of party designations for candidates in local partisan elections when the party to be

designated has not qualified for a place on the statewide ballot. Both sides have now moved for summary judgment on this issue as it has been presented in plaintiffs' amended complaint

If a political party meets the requirements for a position on the primary election ballot that are set out in Elections Code §6430,[1] it is entitled to a position on the ballot throughout the entire state. Political parties qualified to participate in the primary are able to have their candidates in the general election identified on the ballot as representing the party. Elections Code §10210, par. 1.

If a party cannot qualify for the ballot on a statewide basis under Elections Code §6430, candidates representing that party may still attempt to be elected in two ways. First, the candidate may conduct a campaign for write-in votes.[2] Since a write-in candidate's name does not appear on the printed ballot distributed to voters, the write-in candidate can obviously never be identified on the ballot as the candidate of a particular political party. Second, the candidate may gain a place on the general election ballot through the "independent" nomination process outlined in Elections Code §§6800 *et seq.* In this context, "independent" merely means a method of gaining a place on the ballot other than through obtaining the nomination of a qualified party by

[1] A political party or organization qualifying for participation in the primary election through Elections Code §6430 is referred to in the California Elections Code as a "party." Elections Code §39. This order will not employ such a restrictive definition of "party." Organized political groups that qualify under Elections Code §6430 will be referred to as qualified or statewide parties. All other political organizations will be referred to as non-qualifying or local parties.

[2] See, e.g., Elections Code §10204.

winning that party's primary contest. Both candidates truly independent of affiliation with any political party and candidates representing non-qualified parties can get on the ballot in this manner. However, Elections Code §10210, par. 3, prohibits all candidates placed on the general election ballot through the "independent" nomination process from having a party designation printed on the ballot. Instead, the word "independent" must be printed in lieu of a party's name. It is this feature of the election laws that is the focus of plaintiff's motion for summary judgment.[3]

In California, most local elections are conducted on a nonpartisan basis. Elections Code §41. However, there are partisan contests for election to the United States House of Representatives and to both branches of the California Legislature. All of these three positions are filled through elections in districts that encompass only a portion of the entire state. For these elections,

[3] In its entirety, Elections Code §10210 reads:

In the case of candidates for partisan office in a general election or in a special election to fill a vacancy in the office of Representative in Congress, State Senator, or Member of the Assembly, immediately to the right of and on the same line as the name of the candidate, or immediately below the name, if there is not sufficient space to the right of the name, there shall be printed in eight-point roman lowercase type the name of the qualified political party with which the candidate is affiliated.

In the case of candidates for President and Vice President, the name of the party shall appear to the right of and equidistant from the pair of names of such candidates.

If for a general election any candidate has received the nomination of any additional party or parties, the name(s) shall be printed to the right of the name of the candidate's own party. Party names of a candidate shall be separated by commas. If a candidate has qualified for the ballot by virtue of an independent nomination, the word "Independent" shall be printed instead of the name of a political party in accordance with the above rules.

Elections Code §10210, par. 3, prohibits party designations on the general election ballot for candidates who may in fact be the candidate of a political party with significant support within the particular local district where the candidate is running. Only parties qualifying statewide can, through Elections Code §10210, par. 1, be identified as fielding a candidate in a local partisan election.

The individual plaintiffs who are members of non-qualifying parties and who are attempting to gain a place on the upcoming general election ballot through the "independent" nomination process claim in the amended complaint that Elections Code §10210 violates their rights of freedom of speech and association under the First and Fourteenth Amendments and their rights under the Equal Protection Clause of the Fourteenth Amendment by requiring an "inaccurate and arbitrary description of their political affiliation" after their name on the ballot while permitting candidates of parties which have qualified statewide under Elections Code §6430 to use "actual and accurate descriptions of their political affiliations." Amended Complaint, Par. 30(c).

The plaintiff political parties do not identify Elections Code §10210 as the source of California's prohibition against local political parties being identified on the ballot for local partisan elections. Instead, these plaintiffs allege that Elections code §§6430(c) and (d) are unconstitutional "in failing to make provisions for a party to qualify for ballot status on a district-by-district basis, rather than only on a statewide basis." Amended Complaint, Par. 30(d). In our previous order, this Court held that Elections Code §6430 did not prohibit local parties and that the validity of its requirements concerning statewide party qualification for the ballot did not depend on any other provisions of state law that

might prohibit local parties. It is difficult to understand how a statute silent as to plaintiffs' interest in local party ballot status could be the subject of an injunction against its operation. If California's prohibition of local parties is the result of a lack of enabling legislation rather than a statute specifically prohibiting such a result, there would seem to be no need for a three-judge court.

In this case, however, all parties to the litigation recognize that a non-qualifying political party may still place a candidate on the ballot by complying with the requirements of the "independent" nomination process. There is further recognition that Elections Code §10210 prohibits the non-qualifying parties from having their names on the ballot following the candidates they have succeeded in placing on the ballot through the "independent" nomination process and that Elections Code §10210 thus prohibits local parties from appearing on the ballot. The present motions have been briefed by both sides as if the plaintiff political parties were challenging Elections Code §10210. Under these circumstances, it would be pointless to require a further amended complaint, and the Court will consider the plaintiff political parties to also challenge Elections Code §10210.

While the statute does not completely prohibit candidates of non-qualifying parties from appearing on the general election ballot, the prohibition of party designation that is at issue here cannot be considered an aspect of the state's supervisory responsibilities over elections that must be upheld if it has a rational relationship to a legitimate state end. The party itself can never appear on the ballot, and this is a substantial burden on the rights of its members to associate and organize for political purposes. In addition, this prohibition substantially burdens the right to knowledgeably

vote for candidates of the plaintiff political parties.[4] Cf. *Riddell v. National Democratic Party*, 508 F.2d 770 (5th Cir. 1975). Moreover, these substantial burdens are not placed on the qualified parties and their candidates or the rights of voters to knowledgeably choose those candidates. We conclude, as in the previous order in this case, that the validity of the statute challenged here depends on whether it is necessary to further a compelling state interest. *American Party of Texas v. White*, 415 U.S. 767, 780 (1974). Cf. *Buckley v. Valeo*, ____ U.S. ____ ,44 L.W. 4127, 4155 (1976). We therefore turn to the interests asserted by the state.

The state first asserts an important interest in encouraging party activity on a statewide basis. The occupants of the offices in question here do legislate for the state as a whole even though they are not elected on a statewide basis. The state reasons that by encouraging candidates and political groups to either attempt statewide qualification or affiliation with statewide parties, Elections Code §10210 will help to foster candidates for local offices having a non-parochial political perspective.

While the state may have such an interest, however, the Court cannot accept the proposition that this interest can be furthered by completely prohibiting the names of local parties from appearing on the general election ballot.[5] As discussed previously, California does in fact already permit candidates for local partisan offices who are not affiliated with any statewide party.

[4] The restrictions aimed at the plaintiffs who are potential candidates must also be examined with respect to their impact on the voters. *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

[5] *Wood v. Patterman*, 316 F. Supp. 646 (D. Md. 1970), *affirmed* 400 U.S. 859 (1970), a case relied upon heavily by defendant, does not hold that local parties can be prohibited from appearing on the ballot.

These candidates can be the representatives of local political parties. In order to encourage statewide parties, California can create different routes to the ballot for candidates of statewide and local parties. That, however, is not the function of Elections Code §10210, for that statute comes into play only after a candidate of a local political party has qualified for the ballot. The state cannot promote a statewide perspective in its elected officials by depriving the voters of the ability to make an informed choice between candidates representing local and statewide interests and by prohibiting local parties with candidates already on the ballot from competing for votes on an equal basis with the statewide parties. We believe that the Fifth Circuit's comments in a case involving a state's overly restrictive assertion of its interest in party designations on the ballot is appropriate here. "It seems to us the proper course is for the political process to solve this problem—and that solution is not to try to ignore that factionalism in the state exists, but rather for the . . . factions to have the opportunity to pursue their own political objectives without undue hindrance by the state." *Riddell v. National Democratic Party, supra*. 508 F.2d at 778.[6]

The state also asserts an interest in providing its voters with "understandable" choices and in reducing voter confusion. The state does have a vital interest in insuring that parties listed on the ballot have a degree of community support and that the candidates selected by those parties have been chosen by democratic

[6] It is interesting to note that while those elected to the United States House of Representatives legislate for the benefit of the country as a whole, California asserts no interest in encouraging candidates for that office to affiliate with a national party.

methods. The state also has an interest in insuring that voters signing nominating petitions for "independent" candidates have been informed that the potential candidate is a representative of a particular political party. In short, the state does have legitimate and compelling interests in preserving the integrity of its electroal processes. See, e.g., *Storer v. Brown*, 415 U.S. 724 (1974).

While these are legitimate interests, there are means of accomplishing them that are far less restrictive than the present total prohibition of local party designations on the general election ballot. Many states have provisions for local parties to appear on the ballot, and California has not shown that any of the methods of local party qualification employed in these states are not capable of maintaining the integrity of the electoral process. Even important interests of the state must be protected by "means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley v. Valeo, supra*, 44 L.W. at 4134. The state's interests certainly are not promoted by a statute that encourages voter confusion by disguising the true affiliations of the "independent" candidates.

As a final ground in support of her motion for summary judgment, defendant argues that plaintiffs have sued the wrong defendant. She claims that Elections Code §10005 makes local elections officials responsible for providing ballots for the general election and that those officials are the proper defendants for this portion of plaintiffs' case. Defendant seeks to have this portion of plaintiffs' amended complaint dismissed because no local election officials have been joined as defendants.

Defendant's reliance on Elections Code §10005, however, is misplaced. That statute is purely ministerial in nature, for it provides that the local official:

> shall cause to be printed on [the ballots] the name of every candidate whose name has been certified to or filed with the proper officer pursuant to law and who, therefore, is entitled to a place on the appropriate ballot.

Under Elections Code §§6620, 6802, defendant is the state official who would certify to the county clerks the names of candidates for local partisan offices nominated through the "independent" nomination process and would certify their party designations as "Independent." If defendant was enjoined from following the dictates of Elections Code §10210 that have been challenged here, she would certify the correct political party designations of local party candidates, and she is therefore a proper defendant for this portion of the lawsuit.

Five individual plaintiffs in this case -Camejo, Reid, Musa, Macbride, and Bergland- are not seeking to qualify to run in the general election for any local partisan offices. Instead, they seek to run for offices to be voted on statewide- either President, Vice-President, or United States Senator. Elections Code §10210 also prevents a ballot designation of the party supporting them because the only way they will qualify for the ballot is through the "independent" nomination process. But in the case of these five plaintiffs, California law provided an alternative method by which they could have been nominated for a statewide race by a party that could have been designated on the ballot. That way is set out by Elections Code §6430 and the validity of that statute, as it governs the upcoming general election, has already withstood plaintiffs' challenges. Since there was a valid alternative for these five plaintiffs to have their party designated on the ballot, they are not entitled to a declaration that Elections Code §10210 is unconstitutional when it is applied to offices for which votes are cast statewide.

The plaintiff political parties and the other eleven individual plaintiffs, however, are entitled to declaratory relief. As to these plaintiffs, Elections Code §10210 presently unconstitutionally prohibits the designation of a local party on the general election ballot following the name of a candidate for a local partisan office. Nevertheless, even assuming that all eleven plaintiffs succeed in meeting the requirements of the "independent" nomination process and gain a place on the ballot, the Court must decline to grant them the injunctive relief they request.[7] The Court has no method of insuring that the political parties these candidates represent have sufficient community support in the particular local districts where their candidates wish to run to justify having the party name on the ballot. Even if the signature requirements of Elections Code §6831 were an acceptable test, the Court cannot determine that voters signing these nominating petitions were informed that the potential candidate represented a particular party.[8] The affidavits submitted by the plaintiffs are not sufficient for this purpose. In addition, there is no way for the Court to insure that these candidates have been selected in a democratic manner to represent their party.

It is not the function of this Court to prescribe for the state how it should go about solving these problems

[7]With respect to this issue, plaintiffs request the Court "order Defendant to print to the right of each Plaintiff candidate who obtains the required number of signatures pursuant to §6830 the political party with which such candidate is affiliated, and the name(s) of any additional party or parties to nominate such candidate, . . ."

[8]The prescribed form for the nominating petitions does not provide a place for identifying the party affiliation of the potential candidate. Elections Code §6838.

when providing access to the ballot to local political parties. The "independent" nominations procedure is not oriented toward these problems, and nothing in this opinion should be taken to mean that the state cannot devise another system that would provide local party access to the ballot in a constitutional manner. There is not enough time before the upcoming general election to permit the state to devise a system and put it into operation. Finally, there is no present indication that the state will not in the future observe in good faith the declaratory relief plaintiffs have obtained and create a reasonable method for local party access to the general election ballot for local partisan elections.

One final aspect of the amended complaint remains. Although not provided for in the Court's order of June 7, 1976, plaintiffs have "taken the liberty" of adding a challenge to Elections Code §311 to the amended complaint. That statute prescribes the form of the voter registration cards distributed to potential registrants. This statute was enacted as part of a new system of voter registration in California. 1975 Cal. Stats. Ch. 704. As noted in the Court's previous order, this new system did not affect the ability of parties to qualify statewide for the upcoming general election ballot but that in determining the validity of Elections Code §6430 with respect to future elections the new voter registration system would have to be considered. The new statute does not affect the present problem of denial of local party access to the ballot. The constitutionality of Elections Code §311 is therefore not directly connected with any of the concerns that have heretofore been the focus of this lawsuit. Under these circumstances, the Court is of the view that the challenge to Elections Code §311 should be dismissed without prejudice so that plaintiffs may renew their challenge to it, if they so desire, in a new lawsuit that

concentrates directly on these aspects of California's election laws.

ACCORDINGLY, IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment is GRANTED IN PART and that plaintiffs are entitled to a declaratory judgment in accord with the above opinion.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is GRANTED with respect to plaintiffs Camejo, Reid, Musa, Macbride, and Bergland, and that the balance of defendant's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that the allegations of the amended complaint challenging the constitutionality of California Elections Code §311 are hereby DISMISSED WITHOUT PREJUDICE.

DATED: September 9, 1976.

/s/Albert C. Wollenberg
ALBERT C. WOLLENBERG
United States District Judge

/s/James R. Browning
JAMES R. BROWNING
United States Circuit Judge

/s/William G. East
WILLIAM G. EAST
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C-73-1165 ACW
(Three-Judge Court)

SOCIALIST WORKERS PARTY, *et al.*,

Plaintiffs,

v.

MARCH FONG EU, Secretary of State
of the State of California,

Defendant.

JUDGMENT

This action having come before the Court, Honorable James R. Browning, Circuit Judge, Honorable Albert C. Wollenberg, District Judge, and Honorable William G. East, District Judge, presiding, and the issues having been duly presented by the parties, and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The application of plaintiffs (excluding plaintiffs Camejo, Reid, Musa, Macbride, and Bergland) for declaratory relief is granted, and the Court hereby declares that Section 10210 of the California Elections Code is unconsitutional insofar as it prohibits the designation of political parties on the general election ballot following the name of a candidate for a non-statewide partisan office if the political party has not

qualified pursuant to Section 6430 of the California Elections Code.

2. All other requests for relief by plaintiffs are denied.

DATED: September 9, 1976.

/s/Albert C. Wollenberg
ALBERT C. WOLLENBERG
United States District Judge

/s/James R. Browning
JAMES R. BROWNING
United States Circuit Judge

/s/William G. East
WILLIAM G. EAST
United States District Judge

APPENDIX B

FILED
SEP 26 1978
Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOCIALIST WORKERS PARTY, KEN MILINER, LA RAZA UNIDA PARTY, ANDRES RODRIGUES TORRES, PROHIBITION PARTY, WILLIAM SCALF, SOCIALIST LABOR PARTY, HERBERT STEINER, LIBERTARIAN PARTY, ELIXABETH JACOBSEN, SUSAN MARGOLIA,	No. 77-1031
Appellees,	
v.	
MARCH FONG EU, Secretary of State of the State of California,	OPINION
Appellant.	

Appeal From the United States District Court for the Nothern District of California

Before: TRASK and SNEED, Circuit Judges, and RICHEY,* District Judge.

*Hon. Mary Anne Richey, United States District Judge, for the District of Arizona, sitting by designation.

SNEED, Circuit Judge:

This case considers a challenge to section 10210 of the California Elections Code under the First and Fourteenth Amendments. Appellant appeals from one part of the decision of a three-judge district court holding unconstitutional as applied to candidates for non-statewide offices section 10210 (unless otherwise indicated, all code references are to the Cal. Elec. Code). This section specifies that candidates of political parties qualified to participate in the state's primary election shall be designated by party affiliation on the general election ballot while any candidate qualifying for the ballot through the independent petition procedure shall be identified on the general election ballot solely as "independent." Jurisdiction is conferred by 28 U.S.C. § 1291. We reverse.

I.
Background.

A. Statutory Framework.

California provides three routes for a candidate for partisan office to receive votes. First, candidates from political parties qualified under section 6430 who win their party's primary automatically receive a position on the general election ballot. Candidates associated with non-qualified parties, or connected with no party at all, can choose from two remaining alternatives. They may conduct a write-in campaign or they may qualify for the general election ballot through

the "independent nomination" process outlined in section 6800 et seq.

Political parties in California under section 6430 are permitted to qualify only on a statewide basis. Section 6430 provides that a party is qualified to participate in any primary election if (1) any of its candidates in the last gubernatorial election for statewide office receive at least two percent of the vote; (2) 135 days before the primary election, the party possessed registration equal to one percent of the entire vote of the state in the last gubernatorial election; or (3) 135 days before the primary election voters equal to ten percent of the entire vote at the last gubernatorial election sign a petition in support of qualification of the party. Once a party has qualified through one of these procedures, it is entitled to participate in any partisan primary election until its registration falls below one-fifteenth of one percent of the total state registration (§ 6430.5) and it is unable to nominate a candidate who obtains the necessary two percent statewide vote in a gubernatorial election (§ 6430(a)).

California subjects qualified parties to formidable controls. Sections 8500-9956 spell out controls for each qualified party, including provisions respecting organization, meetings, and requirements for party control mechanisms. Qualified parties also must participate in an open primary election in which the nomination of party candidates is subject solely to the vote of members at large (§ 6610). Non-qualified parties are subject to no controls other than the independent nomination procedure outlined below.

If a candidate is not associated with a party or is associated with a party that cannot comply with § 6430, the candidate can attain general ballot status through the independent nomination procedures set forth in §§ 6830-6920. Candidates seeking to be nominated to a statewide office in this manner must receive signatures equal to one percent of the entire number of voters registered for the preceding general election (§ 6831). Independent nomination to an office other than a statewide office requires signatures equal to three percent of the entire number of voters registered for the preceding general election in the area for which the candidate is to be nominated (§ 6831). Petitions for a candidate's independent nomination may be signed by any voter registered in the district, notwithstanding that he voted a partisan ballot in the preceding primary election and without regard to support of any party that professes to nominate the candidate.

Section 10210 sets out the extent to which candidates for partisan office can have political affiliation indicated on the general election ballot. It states in full:

> Political affiliation of candidates; independent candidates
>
> In the case of candidates for partisan office in a general election or in a special election to fill a vacancy in the office of Representative in Congress, State Senator, or Member of the Assembly, immediately to the right of and on the same line as the name of the candidate, or

> immediately below the name, if there is not sufficient space to the right of the name, there shall be printed in eight-point roman lowercase type the name of the qualified political party with which the candidate is affiliated.
>
> In the case of candidates for President and Vice-President, the name of the party shall appear to the right of and equidistant from the pair of names of such candidates.
>
> If for a general election any candidate has received the nomination of any additional party or parties, the name(s) shall be printed to the right of the name of the candidate's own party. Party names of a candidate shall be separated by commas. If a candidate has qualified for the ballot by virtue of an independent nomination, the word "Independent" shall be printed instead of the name of a political party in accordance with the above rules. (emphasis added).

The mandatory inclusion of "Independent" precludes the designation of any party affiliation for an independent nominee to a partisan office. Such a nominee is only entitled to a statement not in excess of three words, allowed to any candidate, independent or not, designating the "principal professions, vocations, or occupations" of the candidate (§ 10211(3)).

B. Procedural Framework.

The present action comes to this court by appeal from the holding of a three-judge district court convened pursuant to 28 U.S.C. § 2281. It concerns the second part of a lawsuit brought by appellees which challenged the constitutionality of § 10210. In the first part of the lawsuit the district court upheld § 6430 against a claim that it constituted an unconstitutional obstacle to ballot access. No appeal was taken from that determination.

Appellees in this second part of their lawsuit asked the district court for declaratory and injunctive relief mandating inclusion of party affiliation on the ballot for all independent nominees for statewide and non-statewide offices in the 1976 California general election and declaring the absolute exclusion of party affiliation for all independent nominees on the ballot unconstitutional. On cross motions for summary judgment, the district court granted partial declaratory relief in paragraph 1 of its judgment and denied all further relief in paragraph 2.[1/] The District

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1/ The district court held solely:

"1. The application of plaintiffs (excluding plaintiffs Camejo, Reid, Musa, Macbride, and Bergland) (all of whom were candidates for statewide offices) for declaratory relief is granted

(con't p. B-7)

court held that § 10210 violated the Equal Protection Clause of the Fourteenth Amendment insofar as it gave candidates associated with local parties no means other than statewide qualifications to have their political affiliation, instead of the term "independent," printed on the ballot. However, the district court, by denying all paragraph 2 relief, denied injunctive relief with respect to the constitutional infirmity it saw in § 10210. Appellees appealed from paragraph 2 of the district court judgment directly to the Supreme Court in November 1976 pursuant to 28 U.S.C. § 1253.[2/]

1/ (con't)
and the Court hereby declares that Section 10210 is unconstitutional insofar as it prohibits the designation of political parties on the general election ballot following the name of a candidate for a non-statewide partisan office if the political party has not qualified pursuant to Section 6430 of the California Elections Code.

2. All other requests for relief by plaintiffs are denied." (explanatory parenthetical supplied).

2/ Section 1253 provides:
"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil

(con't p. B-8)

The Court summarily affirmed the district court's ruling. Socialist Workers Party v. March Fong Eu, 433 U.S. 901 (1977).

Appellant brought this appeal to this court from the grant of declaratory relief in October 1976, basing jurisdiction on 28 U.S.C. 2 1291, which gives the courts of appeal jurisdiction from all final decisions of district courts except those final decisions "where a direct review may be had in the Supreme Court." On November 15, 1977 this court dismissed the appeal sua sponte on the grounds that it lacked jurisdiction in light of the Supreme Court's decision on direct appeal. Upon further consideration the appeal was reinstated on March 27, 1978 and expedited May 31, 1978. We must, accordingly, initially confront the issue of our jurisdiction to hear this appeal.

II.

Appellate Court Jurisdiction.

Although the jurisdictional issue was not raised by either the appellant's opening brief, appellees' reply brief, or the appellant's closing brief, this court raised the issue sua sponte. This court based the dismissal of November 15, 1977 on two grounds: (1) that this court lacked jurisdiction; and (2) that the

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2/ (con't)
action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

appellant's appeal was resolved by the summary affirmance issued from the Supreme Court. Appellant's petition for rehearing addressed the jurisdictional issue and, pursuant to our August 1, 1978 order, appellees have submitted a supplemental brief on the question. After considering the arguments on both sides we conclude that this court has proper jurisdiction and that the Supreme Court action has not precluded review by this court.

A. Effect of Supreme Court Summary Affirmance.

We must commence with acceptance of the Supreme Court's jurisdiction to determine the merits of appellees direct appeal from the district court's denial of injunctive relief. Gunn v. University Committee, 399 U.S. 383 (1970). No such certainty exists with respect to the entire nature and effect of the Supreme Court's decision, however. Section 1253 gave appellees the right to appeal only from "an order granting or denying . . . an . . . injunction." The Supreme Court has held that section 1253, however, does not authorize a direct appeal from a grant or denial of declaratory relief alone. Gerstein v. Coe, 417 U.S. 279 (1974); Gunn, supra; Mitchell v. Donovan, 398 U.S. 427 (1970); Rockefeller v. Catholic Medical Center of Brooklyn and Queens, Inc., 397 U.S. 820 (1970). Nevertheless, the Court has held that it may review both the injunctive and declaratory aspects of a case when a case is properly before it under 2 1253 and the arguments as to both aspects are necessarily identical. Roe v. Wade, 410 U.S. 113, 123 (1973). Our problem, however, is not

whether the Court could have reviewed the declaratory aspects, but whether in its summary affirmance it did so.

The solution of this problem is not easy. The Supreme Court has stated, "Ascertaining the reach and content of summary actions may itself present issues of real substance . . . ." Hicks v. Miranda, 422 U.S. 332, 345 n.14 (1975). In Mandel v. Bradley, 432 U.S. 173 (1977) (per curiam), the Court shed some light on the reach and content of summary actions when it reversed the judgment of a district court that had issued an injunction upon a misinterpretation of a summary affirmance. The Court's opinion makes it clear that courts must exercise care to limit the scope of such precedent. Mr. Justice Brennan, concurring with the Court's opinion, expanded upon the analysis required in this effort:

> "After today, judges of the state and federal systems are on notice that, before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the constitutional questions presented were the same and, if they were, (b) determine that the judgment in fact rests upon decision of those questions and not even arguably upon some alternative nonconstitutional ground." Id. at 180.

Employing Mr. Justice Brennan's guidelines we look forst to the appellees' jurisdictional statement made in connection with its appeal to the Supreme Court. That statement confined the scope of the appeal to questions raised by paragraph 2 of the district court's judgment, i.e., the denial of all further relief. It refers to the Notice of Appeal to the Supreme Court filed with the district court November 23, 1976 which states only that plaintiff-appellees had appealed "from the entirety of Paragraph Two of the Judgment of the District Court." Not only does the present appeal concern only the substance of paragraph 1, which was decided in their exposition of the questions presented on appeal to the Supreme Court made no mention of the issue raised by this appeal, i.e., the propriety of the district court's holding § 10210 unconstitutional as applied to non-statewide partisan offices. The pertinent issue set forth in appellee's jurisdictional statement to the Supreme Court was:

> "(3) Whether California can constitutionally prohibit candidates nominated by petition under §§ 6800 et seq. from accurately designating their political affiliatin to be printed on the state-wide ballot, or whether California can instead insist that the word 'Independent' appear next to the name of every such candidate." (emphasis added).

By appealing to the Supreme Court from paragraph 2 of the district court judgment, the appellees did properly place before the Supreme Court the denial of an injunction as to non-statewide

offices. Such offices also were the focus of the district court's paragraph 1 declaratory relief. It is a fact, however, that the denial of an injunction as to such offices was based on grounds other than those raised in this appeal and peculiar to the situttion that existed at the time of the district court's judgment.[3/]

The appellant filed no cross-appeal of any kind with the Supreme Court. Thus, it did not request that the Supreme Court review paragraph 1 of the judgment. Generally, the Court cannot review the portion of a judgment from which no cross-appeal is taken. Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185, 191-92 (1937). See Swarb v. Lennox, 405 U.S. 191 (1972). Fusari v. Steinberg, 419 U.S. 379, 387 n.13 (1975), which acknowledged that issues not raised by the parties which provide non-constitutional grounds in support of the district court judgment can be considered on appeal, does not benefit appellees. Here the district court denied injunctive relief as to the non-statewide partisan offices on grounds unrelated to the underlying consitutional arguments. It would stand Fusari on its head to contend that it permits the consideration on appel of constitutional issues not raised which support the district court's judgment when that judgment properly rests on non-constitutional grounds. Therefore, we will

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3/ The district court denied injunctive relief because it could not ensure that the candidates in fact represented a particular party or that the person signing candidates' petitions were aware of party affiliation.

not broaden the necessary scope of the Supreme Court's summary action by interpreting it to have decided those unmentioned constitutional theories embraced by the district court in paragraph 1 of its judgment. Moreover, Fusari did not involve a summary disposition, and Mandel cautions us to be hesitant in applying the broad language found in non-summary dispositions, such as Fusari and United States v. Raines, 362 U.S. 17, 27 n.7 (1960), to summary dispositions.

B. No Mandatory Cross-Appeal to the Supreme Court.

Having decided that the Supreme Court's summary affirmance did not decide the issue before us, we next must consider whether appellate jurisdiction is confined solely to direct appeal to the Supreme Court under 28 U.S.C. § 1253. Should that be the case, we must dismiss this appeal. We are of the opinion that appellant was not required to cross-appeal in this case and that this court has jurisdiction to hear this appeal.

Roe v. Wade, supra p. 7, is not to the contrary. The Supreme Court stated it had jurisdiction to review both injunctive and declaratory aspects of a district court judgment when the § 1253 appeal was from a denial of injunctive relief and arguments as to both aspects were necessarily identical. "It would be destructive of time and energy for all concerned were we to rule otherwise." 410 U.S. at 123.[4/] We view Roe v. Wade as

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4/ See p. B-14.

holding only that the Supreme Court may take jurisdiction when the issues presented by the cross-appeal are necessarily identical to the issues raised by the appeal of the denial of injunctive relief. In this case, the necessary identity of issues does not exist. While a hypothetical cross-appeal would have raised the

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4/ In Doe v. Bolton, 410 U.S. 179 (1973), plaintiffs appealed from a three-judge district court decision claiming that they were entitled both to an injunction and to broader declaratory relief. Defendants did not cross-appeal in that case. Instead, defendants had previously attempted a direct appeal pursuant to 28 U.S.C. § 1253 which the court dismissed for want of jurisdiction. Bolton v. Doe, 402 U.S. 936 (1971). Defendants' alternative direct appeal to the Court of Appeals for the Fifth Circuit remained in effect. Citing Swarb v. Lennox, 405 U.S. 191, 201 (1972), the Court acknowledged that technically the extent to which the district court had held portions of the state statutes in question unconstitutional in plaintiffs' favor was not before them. Bolton, 410 U.S. at 187. In a footnote the Court noted that its disposition might nonetheless affect the issues on appeal to the Circuit Court of Appeals. Although the Court did not decide specifically that a cross-appeal would have been appropriate also, this disposition indicates that although the Court can determine all aspects of a case properly before it, it need not do so. The recognition that both avenues of appeal could be valid suggests that a cross-appeal is not mandatory.

constitutionality of the statute as applied to non-statewide offices directly, the issue was not inescapably raised by the appellees' § 1253 appeal to the Supreme Court. To uphold the district court's denial of injunctive relief the Supreme Court was not required to consider the constitutionality of § 10210. It could have relied exclusively on the unrelated grounds employed by the district court. Roe v. Wade thus provides no assurance that the Supreme Court considered the constitutionality of § 10210.

Appellees argue in their jurisdictional brief that the analysis in Jagnandan v. Giles, 538 F.2d 1166 (1976), cert. denied, 432 U.S. 910 (1977) is relevant to our decision on jurisdiction in this case. In fact, Jagnandan supports our exercise of jurisdiction. Plaintiffs in that case sought as a class to have declared unconstitutional a Mississippi statute requiring alien residents to pay nonresident tuition at the State University, and sought restitution of tuition already paid. The district court denied the class action, declared the statute unconstitutional and granted injunctive relief, but refused to award any reimbursement. Plaintiffs appealed only the reimbursement question, neither the injunctive nor the declaratory issue was raised. The Fifth Circuit expressed concern that the reimbursement issue might be so interrelated with the grant of injunctive relief as to require simultaneous disposition on review before the Supreme Court. But because no direct appeal was taken to the Supreme Court by the defendants, there was no possibility in that case of an overlap of review. The court asserted jurisdiction over the reimbursement question,

employing reasoning that is equally applicable in this case:

> "By holding that we have jurisdiction to hear the appeal, we are supporting 'the historic congressional policy of minimizing the mandatory docket of . . . [the Supreme Court] in the interest of sound judicial administration.' MTM, Inc. v. Baxley, . . . [420 U.S. 799 (1975)] at 804 . . . ."

Jagnandan, supra p. 11, at 1171.

Our decision on jurisdiction in this case also favors "sound judicial administration." Assuming arguendo appellant could have cross-appeald to the Supreme Court, nothing requires her to do so when the issues necessarily differ. Judicial economy is not harmed by having this appellate court, which would have been the appropriate avenue of appeal in the absence of a request for injunctive relief, consider an issue neither raised nor argued before the Supreme Court. This disposition does not require the fragmentation of appeals. We hold only that when the Supreme Court, through summary affirmance, upholds a three-judge district court's denial to the plaintiff of injunctive relief, which the district court based on grounds not identical to those involved in considering the propriety of accompanying declaratory relief and which denial was not raised by cross-appeal, the defendant can attack the district court's decision through the normal channel provided by 28 U.S.C. §1291. In so doing we minimize the mandatory docket of the Supreme Court.

III.

Constitutional Argument.

Our holding that jurisdiction exists requires that appellees' constitutional contentions be analyzed. Appellees argue that the operation of § 10210, in conjunction with § 6430, unconstitutionally violates their rights to freedom of speech and association under the First and Fourteenth Amendments and their rights to equal protection under the Fourteenth Amendment.

A. Appellees' Constitutional Interests.

In a number of cases, the Supreme Court has scrutinized laws regulating the electroal process. E.g., Buckley v. Valeo, 424 U.S. 1 (1976); American Party of Texas v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Bullock v. Carter, 405 U.S. 134 (1972); Williams v. Rhodes, 393 U.S. 23 (1968). In so doing, it has established

> "two different, although overlapping, kinds of rights -- the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."

Williams v. Rhodes, 393 U.S. at 30.
The freedom to associate, guaranteed by the First Amendment, has been held to be "fundamental" in several Court opinions, Buckley, supra at 15 & 25;

American Party of Texas, supra at 780; Storer, supra at 729, as has the right of citizens to participate equally in the electroal process, e.g., San Antonio School District v. Rodriguez, 411 U.S. 1, 59 n.2 (1973); Reynolds v. Sims, 377 U.S. 533, 555 (1964).

On the other hand, we have found no case specifically holding that candidates have a right to have specific information identifying their associates placed on the ballot, or that voters, in order to vote effectively, have a right to be informed of those associates by information appearing on the ballot. Nonetheless, we recognize that section 10210 has possible effects on buth associational and voting rights. The failure to permit a non-qualified party designation in non-statewide elections, and the requirement that the designation "Independent" be employed by all independent petition procedure candidates, does dail to inform the voters fully and possibly can contribute to misunderstanding by some voters.

However, we are by no means confident that these consequences affect "fundamental rights" of either candidates or voters. It is open to argument that, within the structure of section 10210, the proper identification of associates and elimination of such voter misunderstandings as might otherwise occur are responsibilities of the candidates and voters, and that the failure of the state to assume such responsibilities does not affect "fundamental rights."

Whatever the merits of this position, we shall assume, arguendo, that section 10210 does

affect "fundamental rights." We therefore turn to determine whether section 10210 imposes a substantial burden thereon.

The Supreme Court has held that:

> "substantial burdens on the right to vote or to associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest." (emphasis added).

Storer, 415 U.S. at 729.
The district court held that section 10210, as applied to non-statewide elections, substantially burdened protected constitutional rights and that the strict scrutiny standard should be applied. We find, however, that no impermissible burden on appellees' rights is imposed by section 10210.

The Supreme Court seldom has had to consider the degree of burden on fundamental rights caused by state voting regulation. In most cases the burden was substantial because the restriction led to absolute exclusion of certain voter options through denial of ballot access, e.g., American Party of Texas, supra p. 13; Storer, supra p. 13; Bullock, supra p. 13; Williams, supra p. 13, or by denial of the franchise itself, e.g., Dunn v. Blumstein, supra p. 13; Kramer v. Union School District, 395 U.S. 621 (1969); Carrington v. Rash, 380 U.S. 89 (1965). As the Court has recognized, however, "not every limitation or incidental burden on the exercise of voting rights is subject to a

stringent standard of review." Bullock, 405 U.S. at 143. A court must "examine in a realistic light the extent and nature of . . [a restriction's] impact on voters." Id. Similarly, the Court has stated that the Equal Protection Clause does not extend to all differences in treatment:

> "If claiming an equal protection violation, the appellant's burden was to demonstrate in the first instance a discrimination against them of some substance. 'Statutes create many classifications which do not deny equal protection; it is only "invidious discrimination" which offends the constitution.' Ferguson v. Skrupa, 372 U.S. 726, 732 (1963)." (footnote omitted).

American Party of Texas, 415 U.S. at 781.

In this case California has placed no unconstitutional restrictions on ballot access. It merely limits an indication of party affiliation to those parties that have qualified on a statewide basis, participate in the state primary, and subject themselves to other state regulation. Appellees argue that to list candidates as "Independent" who affiliate themselves with a non-qualified political party leads to voter confusion. The term "Independent" has a clear meaning in the context of the California ballot qualification procedure. States may in good faith choose a term of art to categorize its candidates without impermissibly burdening their rights or the rights of those who vote for or associate with them. That some voters may

mistake the term does not in itself make this categorization a substantial burden. "Independent" accurately explains the presence of the candidate's name on the ballot. That label, as applied to a candidate from a non-qualified party who has beliefs in common with a certain percentage of a district's registered voters, is no more misleading than the label 'Democrat' or 'Republican' when applied to a person who has won that party's primary but who has beliefs that differ substantially from those of the statewide party. In each case the appellation is a legitimate description indicating the reason a name is on the ballot. In the absence of other misleading conduct, such voter information as might exist cannot be construed to be a substantial burden either on voting or associational rights. Under these circumstances a "compelling state interest" need not be established.5/

It follows, therefore, that we should apply the standard employed in McDonald v. Board of Election, 394 U.S. 802 (1969). In that case,

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5/ The methodolygy of the Supreme Court in analyzing statutes affecting voting rights to determine their constitutionality is not easily discerned. See Rosario v. Rockefeller infra at 767-70 (Powell, J. dissenting). As we read its opinions, a statute must impose more than insubstantial burdens on constitutionally protected voting rights before a close scrutiny standard is required. Cf. Jenness v. Fortson, 403 U.S. 431 (1971). An insubstantial impingement on a "fundamental right" should be scrutinized no more closely than a substantial burden on a "not fundamental right."

the Court, in upholding an Illinois statute restricting the availability of absentee ballots, applied the more lenient 'rational basis' test. It determined that the distinctions drawn by the statute bore a rational relationship to a legitimate state end and were based on reasons related to that goal. Id. at 809.

Similarly, in Rosario v. Rockefeller, 410 U.S. 752 (1973), the Court upheld a New York statute that required voters to enroll in the party of their choice at least 30 days before the general election in November in order to vote in the subsequent party primary. The Court distinguished those cases in which a class of voters was entirely disenfranchised. Id. at 757. The Court held that the time period established was not an "arbitrary time limit unconnected to any important state goal." Id. at 760. Finally, the Court stated:

> "New York did not prohibit the petitioners from voting in the 1972 primary election or from associating with the political party of their choice. It merely imposed a legitimate time limitation on their enrollment, which they chose to disregard."

Id. at 762.

The burden imposed by California by § 10210 is even less substantial than that imposed by New York in Rosario. California does not inhibit voter choice in an absolute manner -- local candidates have liberal access to the ballot and are free to associate with local political

parties of their choice, and no voter is prevented from voting for a candidate in an election. Such burden as may be imposed on the growth of local parties is not substantial and does not constitute an invidious or arbitrary classification.

The district court relied on Riddell v. National Democratic Party, 508 F.2d 770 (5th Cir. 1975), to support its application of the compelling state interest standard. There a Mississippi statute was held unconstitutional which prohibited a political party from using or registering "any name or part thereof" which had previously been registered by another political party. As applied by the State of Mississippi, the statute prevented the so-called "Loyalists" from using the word "Democratic" in its title, a provision designed to favor the so-called "Regulars," an older and more conservative faction of the Democratic Party. The court stated, "In our view there can be no serious doubt that the grant of exclusive rights to the name 'Democratic Party' or the title 'Democratic' . . . constitutes a substantial burden on the ability of Loyalists to organize in the state." Id. at 776. The burden in Riddell is distinguishable from that imposed by § 10210. The Mississippi statute prevented the use of a party name or even a part of a name; California does not prohibit local parties from choosing a particular name to assist in its organizational efforts or from actively promoting the election of a specific candidate. Nor is race a factor in California's statutory scheme as it undoubtedly was in Mississippi's.[6/]

6/ See p. B-24

To the extent it exists, California's burden on fundamental rights is not substantial. It improperly burdens neither candidates nor parties. Its decision to indicate the method through which a candidate has come to appear on the ballot -- through the regulated statewide primary of a party or through an independent nomination procedure -- inflicts no substantial burden on candidates or their associational rights. Local candidates are in a particularly advantageous position to communicate their party affiliation and its relevance to voters. The distinction drawn between statewide parties and local parties does not burden associational or voting rights where, as here, local parties may still qualify candidates, organize and publically endorse their candidates and provide to voters the freedom of choice. A state may rationally choose

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6/ McBride v. Exon, 558 F.2d 443 (8th Cir. 1977) and Shaw v. Johnson, 247 N.W.2d 921 (Minn. 1976), also cited by appellees, are not relevant. MacBride stands solely for the proposition that a state may not perpetuate a statutory scheme that operates to completely prevent a third party presidential candidate from ever obtaining ballot status. Shaw was merely concerned with whether, within the context of the policy reflected by an admittedly inapplicable state statute, voter confusion would result if one candidate were allowed to use solely 'independent' as a ballot designation while others used the term 'independent-republicans.' In holding that such dual use did not contravene the statute's policy Shaw did not address the substantiality of any burden that a contrary result would have imposed.

to have a statewide party qualification and regulation mechanism and to list on the ballot for the benefit of voters the method by which the candidate's place on the ballot was attained. It need not provide publicity to the candidate's party when his position on the ballot may be substantially attributable to the signatures of voters who are not members of his party.

We hold that § 10210 is rationally related to the state's legitimate interest in regulating its electoral process.

REVERSED.

APPENDIX C

FILED
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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOCIALIST WORKERS PARTY, et al., Appellees,	)	NO. 77-1031
vs.	)	ORDER
MARCH FONG EU, Secretary of State of the State of California, Appellant.	)	

Before: TRASK and SNEED, Circuit Judges, and RICHEY,* District Judge.

Appellees' petition for rehearing is denied.

*Hon. Mary Anne Richey, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX D

Article 2

QUALIFIED PARTIES

§ 6430. Qualified parties

A party is qualified to participate in any primary election:

(a) If at the last preceding gubernatorial election there was polled for any one of its candidates for any office voted on throughout the state, at least 2 percent of the entire vote of the state; or

(b) If on or before the 135th day before any primary election, it appears to the Secretary of State, as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, that voters equal in number to at least 1 percent of the entire vote of the state at the last preceding gubernatorial election have declared their intention to affiliate with that party; or

(c) If on or before the 135th day before any primary election, there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the state at the last preceding gubernatorial election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have participate in that primary election. This petition shall be circulated, signed, verified and the signatures of the voters on it shall be certified to and transmitted to the Secretary of State by the county clerks substantially as provided for initiative petitions. Each page of the petition shall bear a caption in 18-point blackface type, which caption shall be the name of the proposed party followed by the words "Petition to participate in the primary election." No voters or organization of voters shall assume a party name or designation which is so similar to the name of an existing party as to mislead voters.

§6460. Statements by county clerk and secretary of state

A statement of the number of voters in his county at the close of registration on the 19th day prior to the transmission of such statement shall be transmitted to the Secretary of State by each county clerk at the following times:

(a) On the 135th day before each presidential primary and before each direct primary.

(b) On the 35th day before each statewide election.

The statement shall show the total number of voters in the county, the number registered as affiliated with each political party, and the number who declined to state a party affiliation.

The statement shall also show the number of voters, by party affiliations, in each city, assembly district, senatorial district, supervisorial district, and congressional district located in whole or in part within the county.

The Secretary of State, on the basis of the statements transmitted to him by the county clerks, and within 30 days after receiving such statements, shall compile a statewide list showing the number of voters, by party affiliations, in the State and in each county, city, assembly district, senatorial district, congressional district, and supervisorial district in the State. A copy of this list shall be made available, upon request, to any elector of this State.

APPENDIX E

CHAPTER 6. INDEPENDENT NOMINATIONS

ARTICLE 1. GENERAL PROVISIONS

6800.

A candidate for any public office, including that of presidential elector, for which no nonpartisan candidate has been nominated or elected at any primary election, may be nominated subsequent to or in lieu of a primary election pursuant to this chapter.

6801.

A candidate for whom a nomination paper has been filed as a partisan candidate at a primary election, and who is defeated for his party nomination at the primary election, is ineligible for nomination as an independent candidate.

6802.

For the purposes of this chapter, the provisions of Chapter 5 (commencing at Section 6400) of this division, so far as consistent with this chapter, shall apply to all offices for which nominations are made at the presidential primary and direct primary elections, as well as to elections for any other office to which Chapter 5 (commencing at Section 6400) of this division would not ordinarily apply.

6803.

Whenever a group of candidates for presidential electors, equal in number to the number of presidential electors to which this state is entitled, files a nomination paper with the Secreatry of State pursuant to this chapter, the nomination paper may contain the name of the candidate for President of the United States and the name of the candidate for Vice President of the United States for whom all of those candidates for presidential electors pledge themselves to vote.

6804.

When a group of candidates for presidential electors designates the presidential and vice presidential candidates for whom all of the group pledge themselves to vote, the names of the presidential candidate and vice presidential candidate designated by that group shall be printed on the ballot pursuant to Chapter 2 (commencing with Section 10200) of Division 7.

§ 6830. Contents

Each candidate or group of candidates shall * * * submit a nomination paper which shall contain:

(a) The name and residence address of each candidate, including the name of the county in which he resides.

(b) A designation of the office for which the candidate or group seeks nomination.

(c) A statement that the candidate is not, and was not at any time during the one year preceding the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper, registered as affiliated with a political party qualified under the provisions of Section 6430. The statement required by this subdivision shall be omitted when no primary election was held to nominate candidates for the office to which the independent nomination paper is directed.

§ 6831. Signatures required

Nomination papers for a statewide office for which the candidate is to be nominated shall be signed by voters of the state equal to not less in number than 1 percent of the entire number of registered voters of the state at the time of the close of registration prior to the preceding general election. Nomination papers for an office, other than a statewide office, shall be signed by the voters of the area for which the candidate is to be nominated, not less in number than 3 percent of the entire number of registered voters in the area at the time of the close of registration prior to the preceding general election. Nomination papers for Representative in Congress, State Senator or Assemblyman, to be voted for at a special election to fill a vacancy, shall be signed by voters in the district not less in number than 500 or 1 percent of the entire vote cast in the area at the preceding general election, whichever is less, nor more than 1,000.

§ 6831.1 Random sampling verification of signatures; individual verification; certification; notification

(a) Within 30 days from the date of receiving the nomination paper if, from the examination of such pursuant to Section 6831, more than 500 signatures have been signed on the nomination paper petition, the elections official may use a random sampling technique for verification of signatures. The random sample of signatures to be verified shall be drawn in such a manner that every signature filed with the elections official shall be given an equal opportunity to be included in the sample. Such a random sampling shall include an examination of at least 500 or 5 percent of the signatures, whichever is greater.

(b) If the statistical sampling shows that the number of valid signatures is within 90 to 110 percent of the number of signatures of qualified voters needed to declare the nomination paper sufficient, the elections official shall examine and verify each signature filed.

(c) In determining from the records of registration, what number of valid signatures are signed on the nomination paper, the elections official may use the duplicate file of affidavits maintained, or may check the signatures against facsimiles of voters' signatures, provided that the method of preparing and displaying the facsimiles is permitted by law.

(d) The elections official shall attach to the nomination paper, a certificate showing the result of this examination, and shall notify the candidate of either the sufficiency or insufficiency of the nomination paper.

(e) If the nomination paper is found insufficient, no action shall be taken on the nomination paper. However, the failure to secure sufficient signatures, shall not preclude the * * * submission later of an entirely new nomination paper to the same effect.

(f) If the nomination paper is found to be sufficient, the elections official shall certify the results of the examination.

§ 6832. Maximum number of signatures

When a nomination paper or sections of a nomination paper have been received which contain the number of valid signatures required in Section 6831, the officer with whom those papers are required to be * * * left shall not * * * accept additional sections of the nomination paper for the candidate named in it.

§ 6833. Time for filing; circulation, and signing

Nomination papers * * * shall be filed with the Secretary of State * * * not more than 129 nor less than 64 days before the day of the election, and shall be prepared, circulated, signed, verified and left with the county clerk for examination * * * no earlier than 134 days before the election and no later than 5 p. m. 74 days before the election. If the total number of signatures submitted to a county clerk for an office entirely within that county does not equal the number of signatures needed to qualify the candidate, the county clerk shall declare the petition void and is not required to verify the signatures. If the district falls within two or more counties, the county clerk shall within two working days report in writing to the Secretary of State the total number of signatures * * * submitted. If the Secretary of State finds that the total number of signatures * * * submitted in the district or state is less than the minimum number required to qualify the candidate he shall within one working day notify in writing the counties involved that they need not verify the signatures.

§ 6834. Signatures; signing for more than one candidate; signer's statement

Each signer of a nomination paper shall sign but one paper for the same office, except that in case two or more persons are to be elected to the same office at the same election, an elector may sign the nomination papers of as many persons as there are persons to be elected to the office, and such act on the part of an elector shall not be deemed in conflict with the signer's statement prescribed in this chapter.

The signer shall declare his intention to support the candidate for nomination, and shall add his place of residence, giving his street and number, if any.

§ 6835. Presentation in sections

Any nomination paper may be presented in sections, but each section shall contain the name of the candidate and the name of the office for which he is proposed for nomination. Each section shall bear the name of the * * * county in which it is circulated.

§ 6836. Affidavit of circulator

The affidavit of any circulator obtaining signatures under this chapter shall be verified free of charge by any officer authorized to administer oaths.

§ 6837. Verified nomination paper; prima facie evidence

A verified nomination paper is prima facie evidence that the signatures to it are genuine and that the persons signing it are voters unless it is otherwise proven by comparison of the signatures with the affidavits of registration in the office of the county clerk.

§ 6838. Form of nomination paper

Each section of a nomination paper shall be as follows:
County of _____ * * *. Nomination paper of _____, candidate for the office of _____.

State of California
County of _____ } ss.

SIGNER'S STATEMENT

I, undersigned, am a voter of the * * * County of _____, State of California. I hereby nominate _____, who resides at No. _____, _____ Street, City of _____, County of _____, State of California, as a candidate for the office of _____ to be voted for at the election to be held on the _____ day of _____, 19__. I have not signed the nomination paper of any other candidate for the same office * * *.

No.	Printed Name	Signature	Residence
1			
2			
3			
4			
5			
etc.			

CIRCULATOR'S AFFIDAVIT

I, _____, solemnly swear (or affirm) that I have been appointed as a circulator to secure signatures in the County of _____ to the nomination paper of _____ as candidate for the office of _____; that the signatures were obtained between _____ 19__ and _____ 19__; that all the signatures on this section of the nomination paper, numbered from 1 to _____ inclusive, were made in my presence, and that, to the best of my knowledge and belief, each signature is the genuine signature of the person whose name it purports to be.

(Signed) _____
Circulator

Subscribed and sworn to before me this _____ day of _____ 19__.

_____
Notary Public (or other official)

(SEAL)

§ 6860. Appointment; filing of appointment documents

A candidate shall appoint circulators to serve, within the county in which they reside, for purposes of securing signatures to his nomination papers. The persons appointed pursuant to this section shall be authorized to secure signatures to the nomination paper of the candidate in that county. The document in which they are appointed shall be filed with the county clerk of the county in which they reside, at or before the date the nomination papers of the candidate is left with the county clerk for filing or for examination. Additional circulators may be appointed in the same manner as the original circulators are appointed.

§ 6861. Qualifications of circulators

Circulators appointed pursuant to this article shall be voters in the district or political subdivision in which the candidate is to be voted on and shall serve only in that district or political subdivision.

§ 6862. Obtaining signatures; persons and places barred

A county clerk or a deputy county clerk shall not be appointed as circulators, and circulators shall not obtain signatures within 100 feet of any election booth or polling place.

§ 6863. Appointment form

Circulators may be appointed by the candidate on a form which shall be substantially as follows:

I, the undersigned, a candidate for the office of _____, which • • • office is to be voted on at the _____ election to be held on _____ day of _____, 19__, do hereby appoint the following voters of the _____ of _____, as circulators to obtain signatures in that _____ to a nomination paper placing me in nomination as a candidate for that office.

CIRCULATORS

Residence	Name
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

(Signature) _____
(Residence) _____

Filed in the office of the County Clerk of _____ County this _____ day of _____, 19__.

_____, County Clerk
By _____, Deputy

§ 6864. Time for obtaining signatures

Circulators appointed to obtain signatures to the nomination paper of any candidate may, at any time not more than 134 nor less than 74 days prior to the election, obtain signatures to the nomination paper of the candidate.

Article 4

ARRANGEMENT AND EXAMINATION OF NOMINATION PAPERS

§ 6890. Return of sections; arrangement for filing and examination

Each section of a nomination paper, after being verified, shall be returned by the circulator who circulated it to the candidate by whom the circulator was appointed. All the sections circulated in any area shall be collected by the candidate and shall be arranged for filing and examination.

§ 6891. Candidates voted for in more than one county or throughout the state; numbering and fastening of sections

For all nominations of candidates to be voted for in more than one county or throughout the state, the nomination papers, properly assembled, may be fastened together by counties, but in no case shall nomination papers signed by voters of different counties be fastened together.

§ 6892. Delivery to county clerk

Nomination papers left with the county clerk for examination shall be delivered to him at least five days prior to the date upon which they are required to be filed with him, with the Secretary of State, or with the clerk or secretary of the legislative body of any city or district, as the case may be.

§ 6893. Examination by county clerk

The county clerk shall examine all nomination papers left with him for filing or for examination and shall disregard and mark "not sufficient" any name appearing on them which does not appear in the same handwriting on an affidavit of registration in his office made on or before the date when the name was signed.

§ 6894. Verification by county clerk; forwarding of papers

Within five days after any nomination papers are filed with him or left for examination, the county clerk shall examine them and affix to them a certificate reciting that he has examined them, and stating the number of names which have not been marked "not sufficient." All nomination papers which are required to be filed in the office of the Secretary of State shall be forwarded by the county clerk to the Secretary of State, who shall receive and file them. All nomination papers which are required to be filed in the office of the city clerk or secretary of the legislative body of any city shall, within five days after being so left, be forwarded by the county clerk to the city clerk or secretary of the legislative body of the city, who shall receive and file them.

APPENDIX F

§10210. Political affiliation of candidates: independent candidates

In the case of candidates for partisan office in a general election or in a special election to fill a vacancy in the office of Representative in Congress, State Senator, or Member of the Assembly, immediately to the right of and on the same line as the name of the candidate, or immediately below the name, if there is not sufficient space to the right of the name, there shall be printed in eight-point roman lowercase type the name of the qualified political party with which the candidate is affiliated.

In the case of candidates for President and Vice President, the name of the party shall appear to the right of and equidistant from the pair of names of such candidates.

If for a general election any candidate has received the nomination of any additional party or parties, the name(s) shall be printed to the right of the name of the candidate's own party. Party names of a candidate shall be separated by commas. If a candidate has qualified for the ballot by virtue of an independent nomination, the word "Independent" shall be printed instead of the name political party in accordance with the above rules.